

1
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

2 *In re:*

3 METRO NEWSPAPER ADVERTISING
SERVICES, INC.,

4 *Debtor.*

Case No. 17-22445-rdd
White Plains, New York
April 28, 2017
11:11 a.m. - 12:12 p.m.

5 - TRANSCRIPT -

6 17-22445-RDD - METRO NEWSPAPER ADVERTISING SERVICES, INC.
7 FINAL HEARING - (WAGES) MOTION TO AUTHORIZE PAYMENT OF PRE-
PETITION WAGES, ETC. [ECF NOS. 7, 17];
8 FINAL HEARING - (CASH COLLATERAL) MOTION FOR AUTHORITY TO
9 OBTAIN CREDIT IN THE FORM OF FACTORING ARRANGEMENT AND
TO SELL ACCOUNTS RECEIVABLE, AND MOTION TO APPROVE USE
OF CASH COLLATERAL AND PROVIDE ADEQUATE PROTECTION
THEREFORE [ECF NOS. 3, 16];
10 (#24) MOTION FOR DAMAGES FOR CREDITOR MISCONDUCT,
11 VIOLATION OF THE AUTOMATIC STAY AND REQUEST FOR SANCTIONS,
COMPENSATORY DAMAGES, ETC. AGAINST TRONC INC. FOR WILLFUL
12 VIOLATION OF AUTOMATIC STAY AND REQUEST FOR
EMERGENCY HEARING ON SHORTENED NOTICE [ECF NO. 24];
13 (#30) AFFIDAVIT DECLARATION OF HORIZON MEDIA, INC.
IN SUPPORT OF DEBTOR'S MOTION;
14 (#34) OPPOSITION ON BEHALF OF TRONC;
15 (#35) DECLARATION OF RICHARD HAUSMANN ON BEHALF OF TRONC.
16 BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

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1 THE COURT: Okay. In re Metro Newspaper Advertising
2 Services, Inc.

3 Okay. There are a number of matters on this calendar
4 too. Why don't we first deal with the final hearings on the
5 motions where, in my absence, Judge Lane granted interim relief
6 earlier in the month?

7 MR. PASTERNAK: Would you like appearances first, Your
8 Honor, from everyone?

9 THE COURT: Sure.

10 MR. PASTERNAK: Okay.

11 THE COURT: Since this is my first hearing.

12 MR. PASTERNAK: Yes, I'd like to introduce our clients
13 here, Your Honor.

14 THE COURT: Okay.

15 MR. PASTERNAK: Good morning, Your Honor, Jonathan
16 Pasternak, DelBello Donnellan & Weingarten, for the Debtor. To
17 my left, Your Honor, is Phyllis Cavaliere, she is the Chief
18 Executive Officer of the Debtor. And to her left is Michael
19 Baratoff. He is the President of the Debtor.

20 THE COURT: Okay. Good morning.

21 MR. PASTERNAK: And to their left is my colleague,
22 Steve Schoenfeld.

23 THE COURT: All right. Good morning.

24 MR. SCHOENFELD: Good morning.

25 MS. SEYMOUR: Good morning, Your Honor, Mary Seymour,

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1 Lowenstein Sandler. We are proposed counsel to the official
2 committee of unsecured creditors.

3 THE COURT: Okay.

4 MR. KLESTADT: Good morning, Your Honor, Tracy
5 Klestadt, of Klestadt Winters Jureller Southard & Stevens, co-
6 counsel for tronc, Inc. And if I may introduce to the Court,
7 William Kelleher and Helen Ward of the Cohen & Grigsby firm from
8 Pittsburgh, they are co-counsel. We filed *pro hac vice*
9 applications yesterday, and are requesting Your Honor entertain
10 them today.

11 THE COURT: Okay. That's fine. And tronc is with a
12 lowercase 'T', right?

13 MR. KLESTADT: It is with a lowercase 'T'.

14 THE COURT: For the benefit of the court reporter.

15 MR. WEINBERG: Your Honor?

16 THE COURT: Yes?

17 MR. WEINBERG: On the phone, Mark Weinberg, counsel
18 for Versant Funding LLC. The pre- and post-petition factor for
19 the Debtor.

20 THE COURT: Right. Good morning.

21 MR. WEINBERG: Good morning.

22 MS. NAKANO: Also on the telephone Serene Nakano for
23 the U.S. Trustee's Office.

24 THE COURT: Okay. Good morning.

25 MR. PASTERNAK: So, Your Honor, with respect to what I

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1 guess we'll call the second-day motions at this point. We did
2 have a first-day hearing before Judge Lane. We had two limited
3 requests at the time. One was that the employee wages that were
4 caught-up in the one-week cycle prior to the bankruptcy be
5 approved within the statutory caps of § 507(a)(4). Judge Lane
6 granted that on an interim basis. With respect to that motion,
7 that payroll has already been made. And as Your Honor has
8 gleaned from the papers, there's no further payroll at this
9 time. The company is essentially dark, but lots still to do in
10 the cases we'll get to at some point in this hearing.

11 We have circulated a form of proposed final order to
12 bless that one pre-petition payroll. The form of order was
13 reviewed by the U.S. Trustee, counsel for the committee. And
14 the committee has given me one or two non-substantive changes to
15 the order. And then we would request that Your Honor approve
16 that limited relief on a final basis.

17 THE COURT: Okay. Does anyone have anything to say on
18 that request? I didn't see any pleadings filed in connection
19 with it.

20 (No response.)

21 THE COURT: Hearing no one, I'll grant the motion on a
22 final basis, subject to my seeing the tweaks.

23 MR. PASTERNAK: Of course, Your Honor.

24 THE COURT: But I'm assuming it's just turning the
25 interim into a final with --

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1 MR. PASTERNAK: It's basically changing it to a final,
2 and then there was one decretal paragraph that authorized the
3 Debtor to honor, pay and modify. I'm not sure why the word
4 "modify" was there anyway.

5 THE COURT: Right.

6 MR. PASTERNAK: So, we're going to delete the word
7 "modify."

8 THE COURT: That's fine.

9 MR. PASTERNAK: And that's about it.

10 THE COURT: That's fine. Okay. And then the second
11 motion is for final approval of the factoring/financing
12 arrangement.

13 MR. PASTERNAK: Yes, Your Honor. So, at the prior --

14 THE COURT: With Versant Funding.

15 MR. PASTERNAK: I'm sorry, Your Honor. So, at the
16 prior hearing, Judge Lane had given the Debtor authority to
17 factor up to \$6 million, which would have been a projection of
18 what the Debtor anticipated to do over a 13-week period in
19 contemplation of the Debtor operating.

20 THE COURT: Right.

21 MR. PASTERNAK: So, the order was entered I believe
22 the next day after the hearing in late March. And then the
23 Debtor actually factored about \$300,000 in receivables before it
24 shut down its operation. But those sales or receivable were
25 under that order. And obviously, we didn't get anywhere near

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1 reaching our \$6 million cap.

2 THE COURT: Right.

3 MR. PASTERNAK: In light of what's going on in the
4 case, and with discussions with the committee, and upon the
5 consent of the factor, it's agreed that we will not treat today
6 as a final hearing. The committee just got formed pretty
7 recently. There are obviously events going on in this courtroom
8 today that very much impact Versant collection of receivables
9 that were factored. And I think the parties have agreed to
10 simply put that final hearing over.

11 THE COURT: Okay.

12 MR. PASTERNAK: I'll just ask Mr. Weinberg if
13 that's --

14 THE COURT: Well, could I --

15 MR. PASTERNAK: -- his understanding.

16 THE COURT: Before he responds to that invitation,
17 this is hypothetical at this point. But assume for the moment
18 that say before the next hearing date the Debtor gets back into
19 business in some way, shape or form.

20 MR. PASTERNAK: Right.

21 THE COURT: You would have the authorization under the
22 current interim order, which you're just extending the date on?
23 Is that the thinking?

24 MR. PASTERNAK: That's exactly right. So, the interim
25 order didn't say the authority ends on --

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1 THE COURT: It's with a dollar amount, as opposed to a
2 date.

3 MR. PASTERNAK: That's correct, Your Honor. So, I
4 felt comfortable with that contingency that you just set forth
5 that we would be covered till another date.

6 THE COURT: Okay.

7 MR. PASTERNAK: Unless anybody disagreed with that.

8 THE COURT: I had a couple of questions on the order.
9 And there may be an explanation for this, but there are a couple
10 of inconsistencies. The grant of the lien --

11 MR. PASTERNAK: Yes.

12 THE COURT: -- in paragraph 3 has a carve out. And it
13 includes in 'D' any assets of the Debtor which may be subject to
14 a purchase upon a security interest.

15 MR. PASTERNAK: Right.

16 THE COURT: And then in paragraph 6 and paragraph
17 11 --

18 MR. PASTERNAK: Yes.

19 THE COURT: -- the carve-out provisions are referred
20 to without that 'D'. And it may have just been omitted.

21 MR. PASTERNAK: Yeah, I think with respect to six, the
22 reason it's not there is because we're not talking about a lien,
23 we're talking about plan.

24 THE COURT: Well, except that it says "and shall at
25 all times be seen to the rights of the Debtor and to the rights

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1 of any person claiming a lien or security interest in any assets
2 of the Debtor. So, it actually --

3 MR. PASTERNAK: Oh, I see that. Right.

4 THE COURT: It is a priority provision. But then it
5 has "any rights."

6 MR. PASTERNAK: So, we should add the PMSI carve out.

7 THE COURT: I think you should.

8 MR. PASTERNAK: Yes.

9 THE COURT: And similarly in --

10 MR. PASTERNAK: Eleven.

11 THE COURT: -- eleven.

12 MR. PASTERNAK: Yes. That deals with replacement
13 liens.

14 THE COURT: Right. And then two other points. In
15 nine, there's an authorization. Is it Versent (ph) or Versant?

16 MR. WEINBERG: Either way.

17 THE COURT: Either way. Okay.

18 MR. WEINBERG: Either way.

19 THE COURT: Versant can withhold all costs and
20 expenses. And they shall be added to the obligations as to the
21 last sentence. The word "reasonable" should precede costs and
22 expenses. And I normally have a 90-day evaluation period,
23 instead of a 60-day one. Particularly when it's from the date
24 of the final order. Now, here it doesn't really matter because
25 we're not doing a final order so that doesn't matter. So, you

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1 can ignore that.

2 MR. PASTERNAK: Now, the word "reasonable" that we're
3 going to add, that's just in the last sentence?

4 THE COURT: No, it's in the front. Versant shall be
5 and hereby is authorized to withhold all reasonable costs and
6 expenses.

7 MR. PASTERNAK: Oh. Oh. Really, it's upfront. I see
8 it, Your Honor.

9 THE COURT: It's the first -- yeah, the first line of
10 paragraph 9.

11 MR. PASTERNAK: Okay.

12 THE COURT: So, with those -- and you could ignore the
13 last comment that I have about 90 versus 60 days.

14 MR. PASTERNAK: Okay.

15 THE COURT: Because this wouldn't be a final order.

16 MR. PASTERNAK: No.

17 THE COURT: And it could be -- therefore, we'll have
18 some extra time to look at it. So, with those changes, I'm
19 happy to sign an interim order. Or schedule it --

20 MR. PASTERNAK: So, what we could do is --

21 THE COURT: Schedule it. It's really an interim order
22 with those tiny changes.

23 MR. PASTERNAK: Yes.

24 THE COURT: Scheduling the final hearing.

25 MR. PASTERNAK: Second interim order.

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1 THE COURT: Right.

2 MR. PASTERNAK: Then we'll get a final hearing date.

3 THE COURT: A final hearing date --

4 MR. PASTERNAK: That's fine, Your Honor.

5 THE COURT: -- we'll get later. Okay.

6 MR. PASTERNAK: All right. And those were really the
7 only two things we had, other than I did make a very lengthy
8 presentation, I believe your law clerk might have been on the
9 phone, about the history of the case.

10 THE COURT: That's laid out in the pleadings.

11 MR. PASTERNAK: Yes. I don't want to belabor the
12 record on that.

13 THE COURT: So, I don't think I need to hear that
14 again. I'll hear frankly anything I need to hear about it in
15 connection with the only remaining matter on the calendar, which
16 is the motion to enforce the automatic stay.

17 MR. PASTERNAK: Right, Your Honor.

18 THE COURT: Against tronc.

19 MR. PASTERNAK: Right. There were some late pleadings
20 I know.

21 THE COURT: Right.

22 MR. PASTERNAK: I'm not suggesting that my adversary
23 filed any pleadings. They didn't technically.

24 THE COURT: No. They weren't late under the notice.

25 MR. PASTERNAK: Right.

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1 THE COURT: The notice gave, frankly, people a chance
2 to make an oral opposition at the hearing. But it just took me
3 a little while to go through them.

4 MR. PASTERNAK: No, understood. And then we had
5 received two declarations from customers of the Debtor which
6 have now been filed and circulated.

7 THE COURT: Well, I actually may only just have one of
8 those. Horizon Media?

9 MR. PASTERNAK: No, there was one --

10 THE COURT: Oh, no, I'm sorry.

11 MR. PASTERNAK: The one from this morning.

12 THE COURT: Respond 2 Communications.

13 MR. PASTERNAK: Yes, Respond 2.

14 THE COURT: Yes. I have them both.

15 MR. PASTERNAK: Yes. Your law clerk acknowledged
16 that --

17 THE COURT: I have them both.

18 MR. PASTERNAK: -- you had received that --

19 THE COURT: Yes. I do have them. Okay.

20 MR. PASTERNAK: -- so we didn't drop off a hardcopy.

21 THE COURT: All right.

22 MR. PASTERNAK: The Response one a little bit more
23 detailed about the nature of the relationship of the Debtor and
24 you know, what the Debtor claims that there's no agency here.
25 So, how would Your Honor like to proceed in terms of the motion?

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1 THE COURT: Well, you're seeking to enforce the
2 automatic stay, so --

3 MR. PASTERNAK: I am.

4 THE COURT: -- you should go ahead with that. I mean
5 I've read the pleadings on this and the cases, and I've actually
6 done some independent research too. This wasn't scheduled as an
7 evidentiary hearing.

8 MR. PASTERNAK: Right.

9 THE COURT: I don't know if people here who are primed
10 to testify, but --

11 MR. PASTERNAK: We are.

12 THE COURT: -- I'm taking it more on the papers at
13 this point.

14 MR. PASTERNAK: I figured and understood that, Your
15 Honor. And if there is the need for further evidence though, we
16 feel that the facts are very compelling. The case law, even
17 though there are cases cited both parties, are factually
18 intensive. And what we believe is that the CBS case just could
19 not be more directly on point with the exact facts at bar here.
20 But there are a few other points that I would now like to raise
21 in response, unless Your Honor has a different agenda in terms
22 of questions.

23 THE COURT: No, go ahead. Go ahead.

24 MR. PASTERNAK: So, I think one of the questions and
25 perhaps the initial pleadings still bring home the points

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1 stronger. Why does the Debtor think this is a violation of the
2 automatic stay? The arguments have been raised; we're not
3 seeking payment directly from the Debtor; we are going under
4 third parties who are not subject to the automatic stay; and
5 those types of arguments.

6 The reason this is what the Debtor perceives this as a
7 violation, Your Honor. 362(a)(3) talks about acts that have the
8 effect of affecting property of the estate. Again, so now the
9 argument is, well, what property of the estate are we affecting?
10 Well, it's very clear. By going after --

11 THE COURT: Can I cut through it?

12 MR. PASTERNAK: Yes. I mean unless you don't --

13 THE COURT: I don't think you have to persuade me of
14 this. Maybe it's for the record, but it seems to me that the
15 argument is that by going around the Debtor, based on, and
16 validly so in the letters, the Debtor's bankruptcy filing, trunc
17 is in essence, cutting the Debtor out of its business. You know
18 it's contractual arrangements with the Debtor's customers and --

19 MR. PASTERNAK: And our ability to collect.

20 THE COURT: -- the Debtor's arrangement with -- I mean
21 part of the Debtor's business is being the interface between the
22 advertisers and the newspapers. And if you cut the Debtor out
23 from being the interface, then there's no reason for the Debtor
24 to exist anymore.

25 MR. PASTERNAK: Well, that is the practical effect of

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1 what has happened here. But on top of that, it is also
2 affecting the Debtor's ability and Versant's by virtual
3 assignment to collect our receivables. Because as tronc goes
4 after our customer's customers, is really what they're doing,
5 then our direct customers say, we can't pay you, we don't know
6 who to pay now. And that's affecting our ability to collect our
7 \$3 million in assigned receivables. And every day that goes by
8 -- here's the irreparable harm. Every day that goes by, we
9 can't collect them, the factor charges increase because they're
10 based on timing of collection.

11 When we entered it into our factoring arrangement a
12 year ago, the whole industry as you have either seen or will be
13 hearing, everybody is on terms with everybody in this industry.
14 You start generally about 60 days from our customers; 60 day
15 with us paying our newspapers.

16 So, there was a very set formula that was applying
17 with Versant, and it was working very well for the Debtor's.
18 Especially when it replaced a very expensive ABL with Versant
19 and it has worked great. but when there is now a disruption in
20 the collection, that 60 days has gone from 90 days, 120 days,
21 and it is eroding what I'll call the due from factoring.
22 Because the factor only advances 75 percent. And at the end of
23 the day, even after it has its costs, its fees, etcetera, there
24 is still hypothetically a due from factor, which we estimate as
25 of the petition date, was no less than half a million dollars.

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1 So, the reason I'm making this argument is so that the
2 argument can't be counteracted. Well, this doesn't really
3 affect the Debtor. It might affect Versant. Boo-hoo. But it
4 does affect the Debtor. Not only with the damage it's done to
5 its customer relationships, which may even be an entirely
6 separate cause of action, but with the Debtor's equity in the
7 factored receivables. So, that's why. And I'll conclude on the
8 363(a)(3) issue. Why we think it clearly applies. And the
9 other argument that is so blatantly obvious at least to this
10 side, is that it was a complete end run of the automatic stay.
11 And none of this activity started until we filed bankruptcy.
12 Just like in the CBS case.

13 THE COURT: Well, the letters make that clear.

14 MR. PASTERNAK: Yes. I don't think there could be any
15 dispute.

16 THE COURT: The demand letters of the clients.

17 MR. PASTERNAK: Yes, all the letters are --

18 THE COURT: I mean what could cut through I would
19 basically say that tronc is putting pressure on you guys to pay
20 because your business is being adversely affected, pre-petition
21 amounts.

22 MR. PASTERNAK: I mean they did pre-petition as
23 anybody who's owed money is going to try and collect money from
24 the account debtor being the Debtor here, and that's fine. but
25 all through that process of collection, as they knew the credit

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1 risk was growing, after having relied on our impeccable credit
2 with them for let's say the last ten year when they were paid
3 over \$140 million by my client in full; another 5 million alone
4 in the last year. They clearly relied on only my client's
5 credit to make decisions as to who is liable. And when it came
6 down to the point of distress in the last year really basically
7 is when the terms were getting modified, the parties went into a
8 workout I would say. But all of the communications dealing with
9 that workout again are only between the Debtor and tronc.

10 THE COURT: Well, so I guess you're leading into the
11 main issue as I see it at least, which is, it seems to me that
12 your argument that the stay is being violated makes sense if the
13 relationship that counts is between tronc and the Debtor.

14 MR. PASTERNAK: Alone.

15 THE COURT: Not between tronc and the advertisers.
16 And on your point that wasn't in the papers, but that you raised
17 today that the receivables really are the Debtor's, as opposed
18 to the advertisers.

19 MR. PASTERNAK: Yes. Absolutely.

20 THE COURT: Because that's tronc's point. It says
21 well, it's very nice that the Debtor is acknowledging that
22 they're liable to us, but the advertisers are too.

23 MR. PASTERNAK: But they have to prove there is a
24 course in dealing here, that there is an agency relationship.
25 And you have to get around Judge Sotomayor's decision that

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1 they're equitably estopped from making those arguments now.
2 It's very convenient that this all has come to light post-
3 bankruptcy.

4 THE COURT: I'm sorry? Judge Sotomayor's decision in
5 which case?

6 MR. PASTERNAK: I'm sorry. In CBS. That was not --

7 THE COURT: That's Judge Wyatt's decision.

8 MR. PASTERNAK: Yes. I'll get back to Judge Sotomayor
9 in another decision.

10 THE COURT: I don't think she was sitting then.

11 MR. PASTERNAK: No, no, no. but we're going to talk
12 about Justice Sotomayor --

13 THE COURT: Okay.

14 MR. PASTERNAK: -- because of the fine prints argument
15 that has now been raised on the website.

16 THE COURT: All right.

17 MR. PASTERNAK: She has clearly disposed of that as
18 having any legal validity or applicability here. But yes, I'm
19 sorry. Getting back to the CBS court case, there's a legal
20 conclusion that there's an equitable estoppel. And it just
21 couldn't be more on point with what we have here. You know
22 there are cases that go both ways based on the facts and you can
23 clearly distinguish Watt; you can clearly distinguish Burdick.
24 In Burdick. In Burdick, I mean the underlying advertiser, which
25 would be our customer, was making payments to the newspaper. I

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1 mean that's an entirely different objective cause of dealing.

2 I mean the course of dealing here is laid out for us
3 in two declarations from customers of the Debtors. Tronc never
4 had any communication, any dealings, any demands, any invoicing,
5 nothing. And there's a reason for that. (A) They relied on our
6 creditworthiness over the years, which had been impeccable until
7 this latest distress. I'm sorry, I lost my train of thought
8 there.

9 And again, it's very clear the way the Debtor's
10 business operates that the Debtor is not just some kind of a
11 pass-through here, Your Honor. The Debtor is not a conduit. It
12 is not an agent in the traditional sense. The Debtor performs a
13 variety of services to its customers. It doesn't just take an
14 ad, send it over to the newspaper, and then add some automatic
15 fixed marketing. It's very clear when you read those two
16 declarations that that's simply not the case.

17 THE COURT: The two advertiser declarations?

18 MR. PASTERNAK: Yes, that's correct. You know, the
19 dealings were always between Debtor and customer that there is a
20 lot that is done by the Debtor. The Debtor is not an
21 advertising agency. That's another misnomer you'll see in my
22 adversary's papers. The Debtor is more of an independent
23 contractor. It is more of a consultant. The Debtor invests
24 millions of dollars in its own technology to come up with
25 products that it uses to then take its customer's requests. Say

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1 I want to put an ad in 18 papers in the Midwest region. Then my
2 client identifies the target markets, goes out, and has the
3 entire discretion on pricing, and then places the ad, gets
4 invoiced in this case, in every case, because that's the custom
5 of dealing in this industry. Gets invoiced, and then my client
6 gives an entirely different type of invoice to its customer
7 which reflects the overhead component, the services, the
8 expertise that it provides to its client in coming up with
9 whatever price.

10 The tronc, what I call the fabricated invoices, which
11 were the ones that were made up post-petition, don't even
12 correspond with whatever pricing the Debtor got from the
13 newspaper. It is not commensurate. In fact, it overcharges
14 customers of customers. They have no idea what we charge our
15 customers.

16 THE COURT: Well, that was a question I had. The
17 objection and the invoices to the customers referred to Metro
18 Newspapers commission. Is there a commission in the billing?

19 MR. PASTERNAK: No, there's no commission. That is
20 another falsehood.

21 THE COURT: Because that is a factor in a lot of the
22 cases.

23 MR. PASTERNAK: There is a discount that the Debtor
24 achieves from the paper because they are doing the papers a
25 favor by not having to do all of this work in dealing with a

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1 particular advertiser. And so, the Debtor gets back a discount
2 in the price for the placement of the ad. That's part of the
3 Debtor's profit. But that is not a direct pass-through to the
4 customer. If you look at our invoicing to our customer, they
5 don't match up with what tronc has created.

6 THE COURT: Do I have an invoice to a customer in the
7 record? I'm not sure I do. I'm not talking about tronc's
8 invoices; I'm talking about one from --

9 MR. PASTERNAK: No, no. We actually were talking
10 about in preparation for today's hearing. So, my clients were -
11 - although we were scrambling to find a copy in my file of what
12 a typical invoice looks like from Debtor to custody, we
13 certainly can describe it to you in great detail today. And
14 perhaps we can spend a minute or two so that you understand --

15 THE COURT: But what you're saying is it includes
16 other charges for services rendered by --

17 MR. PASTERNAK: Sure. It includes a number of fees,
18 service-related charges to the customer that go way beyond some
19 pass-through discount that we achieve with the newspapers for
20 our efficiency and making life a little easier for them in this
21 particular industry. I mean that's why this industry was
22 created. This was created by the newspapers itself because they
23 didn't want to have to deal with 18 million advertisers or
24 advertising firms. This is a distinct micro-industry within a
25 macro-industry. And the course of dealing here is consistent.

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1 And has been between these parties for sure.

2 THE COURT: There is a line that appears in a lot of
3 the case law. It says that generally speaking, although each
4 case should be reviewed on its facts, this is an agency
5 relationship. And that appears in a number of cases. There's
6 one from Maine, Maine Superior Court, 1992. The quote from
7 Judge Ryan gets picked up. Or the case from Judge Ryan gets
8 picked up in three or four, five, six different cases from
9 around the country. Those cases all acknowledge that the facts
10 govern. But when you say this micro-industry was created to be
11 this way, the sort of general initial gloss on it seems to be
12 contrary to that, that it's an agency relationship, and not a
13 separate relationship.

14 MR. WEINBERG: Your Honor?

15 THE COURT: Yes? Hello?

16 MR. WEINBERG: This is Mark Weinberg, if I may?

17 THE COURT: Could you speak a little louder, Mr.
18 Weinberg?

19 MR. WEINBERG: Yes. Can you hear me now?

20 THE COURT: Yes. Even louder would be better.

21 MR. WEINBERG: Okay. If I may, there is a
22 distinction. I think it's contrary to what was represented in
23 tronc's papers. But there is a big distinction that seems to be
24 getting missed here, and that is the fact that we have, for the
25 most part, advertisers; we then have advertising agencies; and

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1 then we have Metro in the middle. So, it's getting lost on the
2 fact that tronc didn't even know who the advertising agencies
3 were. They obviously knew who the advertiser was, because
4 that's who was advertising in their papers. But the fact is
5 Metro was dealing with these advertising agencies. Most of
6 these cases that have been cited, there is not a Metro in the
7 middle. And when Mr. Pasternak speaks of this specialized
8 industry, it's the industry of ad-placement by Metro. Metro is
9 not an advertising agency.

10 THE COURT: So, Metro is not Mad Men?

11 MR. PASTERNAK: Correct.

12 MR. WEINBERG: That's correct.

13 THE COURT: Okay. Well, that does seem to be a
14 distinguishing factor in the case law. Both ways, frankly,
15 because I think some of the case law in your favor, Mr.
16 Pasternak, deals with advertising agencies too.

17 MR. PASTERNAK: It does. But it's logical that how
18 could the Debtor be an agent for customers of its customers. I
19 mean that's two levels down. We have no dealings with the
20 customers. So, that argument must fail.

21 THE COURT: Okay.

22 MR. PASTERNAK: You know one of the issues that was
23 raised in the papers was this fine print on the website. I
24 would refer Your Honor to Justice Sotomayor's Second Circuit
25 decision on that.

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1 THE COURT: No one signed any contract consistent with
2 that website under the UCC and under the case law --

3 MR. PASTERNAK: It just doesn't fit into any of the
4 case law.

5 THE COURT: No one adopted the website, right?

6 MR. PASTERNAK: No. There's no binding, there's no --

7 THE COURT: There's no evidence at least in the record
8 that that's the case.

9 MR. PASTERNAK: Not only is there no binding with the
10 Debtor --

11 THE COURT: I mean to me, the website is kind of like
12 -- unless there's evidence showing that people actually
13 performed under it, it's like the guy in the office saying I
14 declare bankruptcy, you know? Thinking that that actually meant
15 something.

16 MR. PASTERNAK: Well, I mean it goes beyond that
17 because you're talking about two levels down of somebody being
18 bound by it.

19 THE COURT: Well, I understand. Because it's to the
20 advertisers and it doesn't really talk -- at least if I accept
21 what I've just been told about this not being an advertising
22 agency, paragraph 11 refers to advertiser represented by agency.
23 And of course, one has to parse out what that means. Does that
24 mean an advertising agency, or does it mean --

25 MR. PASTERNAK: And then you read the cases and its

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1 using words like agency and advertising. I mean it gets very
2 confusing, but --

3 THE COURT: Well, in any event, it seemed to me this
4 was the only -- I'm going to hear from Mr. Klestadt obviously,
5 but it did seem to me that the only factual argument for the
6 assertion that the people who are receiving the bills are
7 obligated on the bills. Is this printout, which says effective
8 date March 18, 2016, of advertising agreement standard terms and
9 conditions for placement of print, digital and reprint ads. And
10 no one has said that anyone actually accepted those terms.

11 MR. PASTERNAK: No. Not only the Debtor, certainly
12 not the customers.

13 THE COURT: So, then you're left with the legal
14 argument, which I've already briefly discussed that in the
15 absence of the facts at least start the analysis. But can I
16 change --

17 MR. PASTERNAK: Of course, Your Honor.

18 THE COURT: direction a little bit here?

19 MR. PASTERNAK: Sure.

20 THE COURT: The Debtor is not operating at this point.

21 MR. PASTERNAK: That's correct.

22 THE COURT: If I found that tronc was in violation of
23 the automatic stay and should stop sending out these letters; in
24 fact, should rescind them, leaving for a later day all the
25 damages issues, would the Debtor be able to resume business?

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1 Because that affects the speed with which I'd deal with this.
2 If it's not, then I'd like to have a little bit more time to
3 think about it, and give the parties a little bit more time to
4 brief it and have a more complete factual record.

5 MR. PASTERNAK: Again, what we have argued, and I'm
6 not trying to get around your answer, because I'm not sure of
7 the answer. But the only thing I can argue to Your Honor is
8 every day that goes by, there's harm.

9 THE COURT: Right. Well, that's the nature of the
10 automatic stay.

11 MR. PASTERNAK: And it gets worse.

12 THE COURT: And I say this to every party who is
13 alleged to be violating the automatic stay, whether it's a
14 mortgage lender or a trade vender or tronc, the stay is there,
15 it's automatic, it's a statutory injunction. If you're wrong in
16 not having violated it, you're really at risk. Do you really
17 want to do that pending further determination? The ready,
18 shoot, aim approach is a very dangerous approach.

19 MR. PASTERNAK: I understand that and --

20 MR. KELLEHER: Is that our opportunity to respond,
21 Your Honor?

22 THE COURT: Yes. Just on that issue.

23 MR. PASTERNAK: Right. May I sit, Your Honor?

24 MR. KELLEHER: I'll try to limit it, but there's a lot
25 of things in that issue, Your Honor. First of all, William

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1 Kelleher for tronc. Thank you for granting our *pro hac vice*
2 motions.

3 MR. KELLEHER: We take the automatic stay seriously.
4 We understand it; we get it. We didn't hear that from you, with
5 all due respect. We do understand that. But I think it goes in
6 large part to the question you asked Mr. Pasternak. What we're
7 accused of doing is sending letters, dated April 6 and April 7.

8 THE COURT: Well, you did send them out.

9 MR. KELLEHER: We did. We admit it. Absolutely. We
10 sent letters out. This Debtor filed on March 27; on March 31,
11 it laid off substantially all its employees. By April 5, it
12 laid off the rest of its employees, other than a skeleton crew
13 so they can drum up allegations against us. Our letters went
14 out after that. There is no conceivable causal effect between
15 our letters and the Debtor's business problems.

16 THE COURT: Well, then why send out the letters?

17 MR. KELLEHER: Because we have an independent
18 contractual right --

19 THE COURT: No, what I'm saying is, why take that
20 risk? I mean are you facing a limitations defense from the
21 advertisers? I mean if in fact the Debtor is their agent, why
22 would there be any rush to do it?

23 MR. KELLEHER: We're entitled to get paid. We lost
24 over --

25 THE COURT: No, no, no, no, no. Not in the face of

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1 the automatic stay. That's why I don't think you really took it
2 that seriously. There's no rush, right? There's no rush to
3 send out those letters. You're not under any legal risk if you
4 don't send them out.

5 MR. KELLEHER: We're in the same situation as the
6 Debtor. We lost \$2 million because of services we provided; not
7 because of services that Metro provided. They're trying to
8 benefit and hide behind the stay to take advantage of the ads we
9 published.

10 THE COURT: But why won't the money be there? And
11 you're cutting off one source of the money in the first place.
12 I guess I don't understand why you don't seek relief from the
13 stay to do this? In which case the Court can actually decide
14 whether these people are entitled to get their money anyway, and
15 whether you're mocking up the Debtor's business.

16 MR. KELLEHER: We sent letters to non-debtors.

17 THE COURT: No, no. You say that. You say that. And
18 you say you have the right to do that. The whole point of the
19 automatic stay that Congress enacted, and it's not the Debtor
20 asking for an injunction, this is a statutory injunction; is to
21 prevent self-help. So, you're presuming the legal relationship.
22 And it's quite clear, if anything, that that legal relation
23 isn't clear. And yet you're taking a step, whereby, the very
24 act of taking the step, affects the legal relationship. So, I
25 guess what I'm saying is why do it? Why not put it on hold

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1 until the relationship can be decided, as Congress meant, by
2 determining whether the stay applies in first place by making a
3 motion for relief from the stay?

4 Now, I would understand if you were under acute time
5 pressure. Either from a statute of limitations period or some
6 other time pressure affecting your business, but that just goes
7 to my scheduling a hearing on relief from the stay, which I
8 could do on an emergency basis. So, again, this seems to me to
9 be a very risky strategy.

10 MR. KELLEHER: I don't believe we're under, that I'm
11 aware of, a statute of limitations' issue. But you did hear Mr.
12 Pasternak this morning say, "Oh, they should be estopped." The
13 answer to that is no, we shouldn't. As soon as the issue --

14 THE COURT: Well, the estoppel argument is based on
15 the pre-petition conduct. Post-petition, totally different.

16 MR. KELLEHER: But the recipients of those letters are
17 not in bankruptcy. There's no post-petition with respect to
18 them. They're not in bankruptcy.

19 THE COURT: They're not arguing estoppel; it's the
20 Debtor that's arguing estoppel.

21 MR. KELLEHER: The Debtor wants to waive the estoppel
22 argument, that's fine with us. But we've got to defend that; we
23 have to respond to that.

24 THE COURT: You have to respond to the fact that you
25 didn't act on this pre-petition when there was a financial

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1 problem. But that's not for the advertisers; that's for the
2 Debtor. I just don't see why this is being done this way.

3 MR. KELLEHER: We're happy to file a motion for relief
4 from stay, and have it considered by the Court.

5 THE COURT: But in the meantime, you in essence have
6 decided how that motion occurs by sending out the letters, and
7 not putting it on hold. I mean, that to me is very problematic.

8 MR. KELLEHER: Well, we apologize to the Court. It
9 wasn't to violate the stay.

10 THE COURT: No, it's not a question of apology, it's
11 just the law. The whole point of the automatic stay is people
12 don't engage in self-help. They don't presume the answer. I
13 mean it's one thing if you know the answer. If you're drawing a
14 letter of creditor, you don't have to wait, because you know the
15 answer. Notwithstanding the bravado in the response to Mr.
16 Pasternak's email, I know, because I've looked at this, you
17 don't know the answer. He doesn't really know the answer
18 either. And in those circumstances, no one should be acting
19 contrary to the automatic stay. Congress had a stop, look and
20 listen in the automatic stay.

21 MR. KELLEHER: And Congress also said like the letter
22 of credit situation.

23 THE COURT: This isn't a letter of credit situation.
24 That's one finding I can make today. And I can find today that
25 you're in violation of the automatic stay merely because you're

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1 doing self-help in a situation where there is substantial doubt
2 that you have a right to do so. And it has consequences. The
3 facts ultimately may turn out that the Debtor's business was DOA
4 on the petition date. But at the same time, why do this if that
5 isn't the case, but it's DOA tomorrow?

6 MR. KELLEHER: Well, that's not the case. It was DOA
7 before we sent the letters.

8 THE COURT: Well, you know what? I don't know that.
9 I don't know that. And frankly, it doesn't make sense to me
10 this rush. It just doesn't make sense. There seems to be an
11 ulterior motive behind it, because again, the policy of the
12 stay, unless it's crystal clear, is you don't shoot first and
13 aim letter because it's a statutory injunction. Which by the
14 way, deals with the jurisdiction on procedural arguments you've
15 raised. The Debtor is not seeking an injunction; there is an
16 injunction. And Congress did not intend to have the adversary
17 proceeding rules apply when someone is violating an injunction
18 that may be killing a Debtor's business or providing them with a
19 house, or any of the other reasons that the automatic stay
20 protects property.

21 It doesn't require the timing of notice for a
22 complaint, and an answer, and discovery to enforce the automatic
23 stay. It doesn't provide the burden to be on the Debtor to
24 establish an injunction. It's a statutory injunction. The
25 burden is on the party who would be perhaps entitled to relief

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1 from the stay to seek it. But again, unless it's crystal clear,
2 they should be seeking relief. This isn't a guarantee
3 situation.

4 You have to prove in the first instance that these
5 people that you're gunning now actually owe an obligation to
6 you, and that you can circumvent the Debtor in seeking that
7 obligation to be paid. Notwithstanding your long-time
8 contractual relationship with the Debtor. So, there's a real
9 risk there. And I just don't understand why instead of making a
10 motion with proper briefing, other than between four o'clock
11 yesterday afternoon and 10:30 this morning, for the Court to
12 review it, that that's not being done. And to me, that's a
13 violation of the automatic stay. That's not how bankruptcy is
14 supposed to work.

15 MR. KELLEHER: To use Your Honor's words, we didn't
16 think we were shooting at the Debtor. And --

17 THE COURT: Well, but you're clearly shooting at the
18 Debtor. You're basically saying, the Debtor is not going to be
19 conducting the type of business that the Debtor's business is.
20 We're dealing with you directly now. Period. You know, come
21 on. Let's be real.

22 MR. KELLEHER: That's actually not what we said.

23 THE COURT: Shall we read the letter together? You
24 know I give you points for candor, whoever drafted the letter to
25 the customers.

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1 MR. PASTERNAK: It's Exhibit C to the Debtor's motion,
2 Your Honor.

3 THE COURT: Right. Right. Right. I have the one to
4 insight pharmaceuticals.

5 MR. PASTERNAK: Right.

6 THE COURT: "As you are aware, Tronc, Inc. (formerly
7 Tribune Publishing, "tronc") has provided substantial
8 advertising services to and for the benefit of Insight. The
9 insertion orders for tronc services were often placed on your
10 behalf by your agent, Metro Newspaper Advertising Services, Inc.
11 ("Metro")." Now, let's just stop there.

12 There's a significant factual dispute on that issue.
13 All right? "And certain invoices", let's stop there. Were
14 there any invoices that weren't issued directly to Metro, as
15 your agent? I mean again, major factual dispute. Right? Was
16 Insight ever billed directly when the orders were placed by
17 Metro?

18 MR. KELLEHER: No. Not prior to this.

19 THE COURT: Okay. So, it says certain invoices were
20 issued directly to Metro. As if there were really invoices
21 issued to Insight. And then it says "As you know, Metro has
22 filed Chapter 11 bankruptcy in the United States Bankruptcy
23 Court for the Southern District of New York. Accordingly, no
24 further invoices for any pre-petition bankruptcy services will
25 be issued to Metro at this time."

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1 MR. KELLEHER: Your Honor, can I go back to your
2 "certain invoices" question?

3 THE COURT: Yes.

4 MR. KELLEHER: The way this works is we would get a
5 purchase order called "Insert Orders" in the print advertising
6 business that would have our price on it. And it would have
7 Metro's commission and another commission if -- and by the way,
8 notwithstanding the representations this morning, there were not
9 always intervening advertising agencies in these arrangements.
10 But sometimes you would have second commission on there. That's
11 how Metro gets paid by its principal. Not us. We don't pay
12 Metro, they have their relationship directly with the
13 advertiser. That amount for our price is the certain invoice
14 that's referenced in there. So, there is a distinction between
15 what we're charging for publishing, and what Metro charges for
16 whatever else Metro charges, the way it gets paid by its
17 principal. And that's the only thing that's in --

18 THE COURT: You think that's how Insight would read
19 this?

20 MR. KELLEHER: I think when they look at what's
21 attached, yes.

22 THE COURT: Well, I guess we'll see some day. But it
23 just seems to me that you are unilaterally deciding how you
24 should be paid. And this is not a guarantee. Is there anything
25 in writing from any of these people you send letters to where

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1 they say we're liable?

2 MR. KELLEHER: From any of the people after we sent
3 these letters?

4 THE COURT: Yes. Or before.

5 MR. KELLEHER: Yes. Some of the responses we got when
6 Metro went out of businesses, we're going to take over Metro's
7 business, or we're going to deal with you direct.

8 THE COURT: Right.

9 MR. KELLEHER: And just like the standard and customs
10 in this industry, some of them say we want you to look only to
11 the advertising because the advertiser is liable as the
12 principal. The exact opposite of what they're saying this
13 industry is, and consistent with what this Court said in the
14 Burdick situation. It is known out there that the advertisers
15 are liable. And that's correspondence that tronc and this
16 Debtor has had too, our right to go after the advertiser. This
17 didn't just come up post-bankruptcy.

18 THE COURT: Is that in the record at all?

19 MR. KELLEHER: No. We have a witness prepared to
20 testify about that. And, Your Honor, we'll request, we'll beg,
21 an opportunity to file a relief from stay motion and tee the
22 issue up for you.

23 THE COURT: In the meantime, I think you should tell
24 these people, while you're fully reserving your rights, that
25 you're rescinding the bills. I think you're violating the stay,

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1 unless you do that.

2 MR. KELLEHER: As long as we can fully reserve our
3 rights, Your Honor, we're happy to do that.

4 THE COURT: It's just that you're walking into a big
5 problem if you don't do that.

6 MR. KELLEHER: We think that's in part because the
7 facts are misrepresented to you. We understand there's an
8 issue --

9 THE COURT: Well, but that's what the automatic stay
10 is all about, so this Court will have some time to sort out
11 those facts without the Debtor's business or Debtor's house
12 being lost.

13 MR. KELLEHER: We understand, Your Honor. We're happy
14 to file that.

15 THE COURT: Okay. And I appreciate your saying the
16 Debtor's business was already lost, but I don't know that today.
17 And if the continuation these billing notices is causing it to
18 get worse, that's a real problem. So, I'm happy to adjourn
19 this, so parties can develop the facts; we can have an
20 evidentiary hearing noticed with proper preparation for it, as
21 long as the word goes out to each of these people that got these
22 letters that for the time-being with fully reserving our rights,
23 you are to perform as you previously performed.

24 MR. PASTERNAK: Your Honor, also anyone who they may
25 have communicated with. We don't even know the --

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1 THE COURT: Well, I don't know who -- I mean I'm
2 assuming there were just letters, but maybe there --

3 MR. PASTERNAK: I don't know.

4 THE COURT: Were there phone calls also?

5 MR. KELLEHER: One thing we will agree, and I think it
6 was your comment, it might have been his; we have been candid.
7 We identified everybody who got a letter.

8 THE COURT: All right.

9 MR. KELLEHER: And a footnote to the pleadings.

10 THE COURT: All right. But Mr. Pasternak's point was
11 a little different than that. Are there also separate companies
12 that got phone calls or --

13 MR. KELLEHER: Not to my knowledge.

14 THE COURT: Okay.

15 MR. KELLEHER: But we can confirm that.

16 THE COURT: I think it's a fair point though. I think
17 it shouldn't just be the people who got letters. If there's
18 anyone who has been told "pay us directly" that should be
19 rescinded with a full reservation of rights.

20 MR. KELLEHER: Coincidentally, the two declarations
21 that were filed that I didn't see until ten minutes after the
22 hearing was supposed to start --

23 THE COURT: Right.

24 MR. KELLEHER: -- did not get communications from us.
25 I don't know how they got them, they didn't get them from us.

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1 And they raise exactly the issue. They want a declaratory
2 judgment that there's no double liability.

3 THE COURT: No, I understand. And there are important
4 issues at stake here that I can't sort out today. We don't have
5 half the witnesses here that we need to have for it. And it's
6 not scheduled as an evidentiary hearing. For example, neither
7 of you guys, I think, cited this, but there's an opinion by
8 Judge Glenn from 2010, In re Richards Fliss Clark & Co., Inc.,
9 2010 Bankr. Lexus 3923 (Bankr. S.D.N.Y. Nov. 1, 2010), where the
10 issue was whose property is the payment. Again, that was why I
11 was questioning Mr. Pasternak about the nature of the
12 receivable. And frankly the issue of who the customers really
13 are was really flagged for me at least during the hearing.

14 So, all of those issues I think need to be sorted out
15 carefully with discovery and with factual development in an
16 evidentiary hearing. But I can't do that and leave the gunning
17 notices out there, because that's self-help, and that has to
18 stop.

19 MR. KELLEHER: Your Honor, we'll file a relief from
20 stay motion, and we'll; we'll send letters to the 19 folks who
21 got them saying that all this is on hold until you resolve the
22 motion, and --

23 THE COURT: Well, it's not just on hold. They should
24 perform as they've previously performed.

25 MR. KELLEHER: I don't know what that means, Your

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1 Honor.

2 THE COURT: Well, they're supposed to pay the Debtor.
3 Right? Or if they pay you directly. They're just supposed to
4 perform as they previously performed, as they previously paid
5 their bills until this is sorted out.

6 MR. KELLEHER: That gets to the question of the
7 declaratory judgment that the others want you to issue. That
8 exposes them to double-liability.

9 THE COURT: No, this is just for the time-being, until
10 the issues to be raised in a lift-stay motion are sorted out.

11 MR. PASTERNAK: Your Honor, I would request that, at a
12 minimum, the Debtor get to review this form of notice.

13 THE COURT: Oh, yeah, of course.

14 MR. PASTERNAK: And perhaps the Court, more
15 importantly.

16 THE COURT: No, I think as part of a scheduling order,
17 the notice should go out. You should review it, and then it
18 should be attached to the order. And I can say that in light of
19 this notice, and the representation that no one else has been
20 contacted, other than the people receiving this notice, I'll
21 adjourn the hearing on this motion, to coincide with the hearing
22 on the lift-stay motion.

23 MR. PASTERNAK: And I would ask that Your Honor just
24 retain -- obviously, you have jurisdiction. But if we can't get
25 on the same page with this language, maybe Your Honor would

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1 break the tie.

2 THE COURT: Then the order will say what the letter
3 should say.

4 MR. KELLEHER: Your Honor, I'm sorry, I didn't
5 understand that question.

6 THE COURT: If you can't agree on this letter,
7 although I'm assuming you can, because I've been pretty clear.

8 MR. KELLEHER: No, no. I thought he had some question
9 about wanting us to stipulate to jurisdiction.

10 THE COURT: No, no, no, no. No, he just wanted -- I
11 think what Mr. Pasternak was saying is if you two can't agree on
12 the form of this letter, then they reserve the right to submit
13 an order, which should say what it should say, I would put it in
14 the order. But you'll agree it, I'm confident. But if not,
15 I'll do that.

16 Now, I think it's --

17 MR. WEINBERG: Your Honor?

18 THE COURT: Yeah, go ahead.

19 MR. WEINBERG: This is Mark Weinberg again. I have no
20 idea what this letter is going to actually look like. But my
21 sense is that if it's not fairly strong, it's going to have
22 absolutely no affect.

23 THE COURT: Well, no, I need --

24 MR. WEINBERG: We all know people who are concerned
25 about having to pay twice are going to pay no one. So, a lot of

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1 damages has clearly already been done. The question is, is
2 there a way to undo it --

3 THE COURT: Well, they are to pay the Debtor as per
4 their normal practice, because this demand letter is being
5 rescinded with a reservation of rights.

6 MR. WEINBERG: Okay.

7 THE COURT: You know, if they don't pay the Debtor,
8 they're in trouble. So, you know, they need to pay. They can't
9 just hold it. They'd be in violation of the automatic stay.

10 MR. WEINBERG: The devil will be in the details. I
11 guess the question is how much fear is put into them by
12 reservation of rights.

13 THE COURT: They don't have a set off right, I don't
14 believe.

15 MR. KELLEHER: Your Honor, we can't agree in the
16 letter that it will say they should pay the Debtor. We can
17 agree as you said that they follow their normal practice. We're
18 find with that.

19 THE COURT: Okay. I'm assuming that, yes, that's
20 fine. They follow their normal practice.

21 MR. KELLEHER: We can argue later as to what that
22 means or the consequences of that. But we can't stipulate that
23 they can pay the Debtor.

24 THE COURT: No, no. Their normal practice is with the
25 Debtor.

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1 MR. KELLEHER: We don't know that, but that's fine.
2 We're okay with that.

3 THE COURT: Okay. That's fine. What I was going to
4 say is that assuming we get over that hurdle, and I should have
5 that on Monday. I need to get that order out with that letter
6 attached to it. And if you agree on the form before then, you
7 can send it out before Monday.

8 After that's done, you two or you three, Mr. Klestadt,
9 should talk about, and also, counsel to the committee, the
10 process for the evidentiary hearing on the lift-stay motion, and
11 on the remaining portion of this motion, which merits an
12 evidentiary hearing. And to my mind, you should probably
13 sequence it so that the first issue is the agency issue, and the
14 second issue is any damages. I mean obviously if the Debtor is
15 a mere agency, and the customers are liable, then they're
16 minimal damages.

17 MR. PASTERNAK: Right.

18 THE COURT: If any.

19 MR. PASTERNAK: There might be damages.

20 THE COURT: There might be, but I think we should
21 focus on that issue first, because that's to me not necessarily
22 a complete gate-keeping issue but the issue to be focused on
23 first. And then on damages. Probably at a separate hearing.
24 And, frankly, if you know the answer to the first hearing, you
25 can probably settle the damages issue.

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1 The second point, Mr. Pasternak and Mr. Klestadt know
2 this, but I want to get it on the record. My normal practice
3 with evidentiary hearings is that the parties present their
4 direct testimony by declaration or affidavit and then the
5 witness is there for cross examination and redirect. Obviously
6 if a witness is under your control, then direct is live. You
7 have to make sure that person is here of course.

8 Secondly, I expect the parties to identify the
9 exhibits they intend to introduce, meet and confer, and use
10 their best efforts to agree on the admissibility of as many of
11 them as they can, and have a joint exhibit book, and present
12 that along with the declarations three days before the hearing
13 to chambers. If it's a weekend, five days before the hearing.
14 But three business days before the hearing.

15 I'm not a big fan of motions *in limine*. I usually
16 deal with evidentiary objections at the hearing. If there's
17 something that really is going to affect your whole trial
18 strategy, then I'll hear motions *in limine* promptly before the
19 hearing. But hopefully you won't -- you know, if you have
20 disputed exhibits, just put it in a different binder.

21 MR. KELLEHER: And I apologize, Your Honor. This is
22 probably out of ignorance for your practice, but I didn't hear a
23 discovery schedule in there. Is that standard in your
24 scheduling orders?

25 THE COURT: Well, I don't know how much discovery you

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1 need. But frankly, if the letters have been rescinded, I think
2 we can follow the Part 7 rules for the rest of this.

3 MR. PASTERNAK: Meet and confer.

4 THE COURT: Yes. So, you can set up a discovery
5 schedule that way. You know, discovery in bankruptcy is
6 expedited. It's not the normal six months to a year that
7 litigators are used to.

8 MR. KELLEHER: We'd be delighted for that.

9 THE COURT: And I'm assuming the parties have thought
10 a fair amount about this before they took the actions they did.

11 MR. KLESTADT: Your Honor, Tracy Klestadt. It may be
12 helpful for us in terms of framing the schedule and the calendar
13 to have an idea of when Your Honor may be available for the
14 evidentiary hearing.

15 THE COURT: Well, you can talk to Ms. Li about that.

16 MR. KLESTADT: Okay.

17 MR. PASTERNAK: And work back from a date.

18 THE COURT: Right. Right.

19 MR. PASTERNAK: Very well, Your Honor. I think that's
20 everything to do with our motion for now.

21 THE COURT: Okay. The committee just got organized.
22 They may want to weigh in in some way, shape or form. I'm happy
23 to have a pre-hearing conference, which I can do by phone if
24 there are issues that come up. I have a form of pre-trial order
25 on the website. If you want to memorialize a schedule, you can

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1 submit that.

2 MR. PASTERNAK: We'll work it out, Your Honor, I'm
3 sure. At least that part of it.

4 THE COURT: All right.

5 MR. PASTERNAK: Thank you very much, Your Honor, for
6 entertaining us on short notice.

7 THE COURT: Okay.

8 MR. PASTERNAK: And welcome back.

9 THE COURT: I guess the one other thing, and I'm not
10 sure which of you said this, but as it's teed up right now for
11 matters that I'll be hearing between the Debtor and tronc, this
12 isn't really a declaratory judgment that would be binding on the
13 advertisers or the customers or however you want to describe the
14 principals. You know, whichever label people want to pin on
15 them. Their rights may or may not be --

16 MR. PASTERNAK: Governed.

17 THE COURT: The Debtor may be collaterally estopped
18 vis-à-vis them, and you guys may be collaterally estopped.
19 They're not going to be a party to this. So, it's not really a
20 declaratory judgment action ultimately on their rights. It's
21 just --

22 MR. KELLEHER: Understood, Your Honor. It might be
23 the law of the case, but --

24 THE COURT: Well, no.

25 MR. KELLEHER: Depending on the facts, right?

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1 THE COURT: Okay.

2 MR. PASTERNAK: Thank you again, Judge.

3 THE COURT: All right. Thank you.

4 MR. KLESTADT: Thank you, Your Honor.

5 THE COURT: Okay.

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1 CERTIFICATION
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4 I, Rochelle V. Grant, certify that the foregoing is a
5 correct transcript from the official electronic sound recording
6 of the proceedings in the above-entitled matter.

7 Dated: May 4, 2017


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Signature of Approved Transcriber